(3)

No. 91-713

In The

Supreme Court of the United States

October Term, 1991

GERARDO ACUNA CASTILLO, et al.,

Petitioners,

versus

SHELL OIL COMPANY, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF OF PETITIONERS

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I. THE DECISIONS BELOW INESCAPABLY CONFLICT WITH *VOLVO*, *GRAVITT*, AND *BRISCOE*, FOR THERE IS NO NEW RULE THAT ALL REMANDS FOR REASONS OTHER THAN LACK OF SUBJECT MATTER JURISDICTION CAN BE REVIEWED.

The only attempt by Respondents to distinguish *Volvo Corp. v. Schwarzer*, 429 U.S. 1331 (Rehnquist, Circuit Justice 1976), *Gravitt v. Southwestern Bell Telephone Co.*, 413 U.S. 723 (1977), and *Briscoe v. Bell*, 432 U.S. 404 (1977), is with the argument that the remands in those cases were for lack of subject matter jurisdiction; all other remands, Respondents argue, are now reviewable, and so those cases don't apply. See Brief in Opposition at 7 ("[R]eview is unavailable only where the Court below lacks subject matter jurisdiction."), and at 7 n. 2 ("The Courts below had subject matter jurisdiction and, consequently, since the remand orders in question were not based on lack of subject matter jurisdiction but on an alleged defect under 1441(b), the District Court Orders were not immune from review under §1447(c) . . . ").

Needless to say, there is no such new rule. 28 U.S.C. §1447(d) has not been amended to concern only subject matter remands; it still provides that "[a]n order remanding a case to the state court from which it was removed is not reviewable on appeal or otherwise. . . . " Nor has this Court, nor any court other than the Fifth Circuit, made such a holding.

Respondents seem to suggest that the amendment to §1447(c), prescribing a 30-day time limit on some remand

motions, has worked a change in §1447(d) as well. They state that "§1447(c) was amended in 1988 so that now the only ground specified in 1447(c) is lack of subject matter jurisdiction." Brief in Opposition at 7 n. 2. The amendment to §1447(c), however, did nothing more than set out the time limit for certain motions; it says nothing in regard to reviewability.

Aside from the plain and unchanged language of §1447*(d)*, the argument that only subject matter jurisdiction remands are unreviewable has been rejected before and after the 1988 amendments. First, the implicit construction given *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976) by Respondents, in a footnote, is wrong. Contrary to that intimation, review was available in *Thermtron* not because something other than subject matter jurisdiction was involved; rather, the remand below had been granted because of a wholly unprescribed *preference* on the part of the district judge. This Court specifically noted that *removal jurisdiction*, as well as subject matter jurisdiction were unquestioned:

> "[I]t has not been questioned in this case . . . that it is within the so-called diversity jurisdiction of the District Court and that it could have been initially filed in the District Court pursuant to 28 U.S.C. §1331. *It also seems common ground that there is not express statutory provision forbidding the removal of this action* and that the cause was timely removed in strict compliance with 28 U.S.C. §1446.

Id., 423 U.S. at 343-44 and n. 8 (emphasis added). *Thermtron* thus reaffirms that a remand on any authorized

ground, certainly including lack of removal jurisdiction, is immune from scrutiny.

One of the first cases to construe *Thermtron* held that a remand based on the presence of local defendants could not be reviewed by mandamus. In *Midland Mortgage Co. v. Winner*, 532 F.2d 1342 (10th Cir. 1976), the district court remanded a case in which there was complete diversity but several defendants were forum residents. In rejecting the mandamus petition, the Tenth Circuit stated:

> We have no case like *Thermtron* where the District Court remanded because of the crowded condition of its civil docket, a ground not provided for remand in §1447(c). Without reaching or deciding whether remand was proper in the instant case, it is sufficient to say that the court clearly based the order of remand on grounds provided by the statute.

Id., 532 F.2d at 1344. *Midland Mortgage* presents the same situation found here: remand because of the statutory restriction on removal in §1441(b). The Tenth Circuit's refusal of mandamus demonstrates that *Thermtron* review does not extend to this class of remand orders.

Review of remands for reasons other than lack of subject matter jurisdiction, indeed for reasons outside §1447(c), has continued to be denied after the 1988 amendments to the removal statutes. In *Washington Suburban Sanitary Commission v. CRS/Sirrine, Inc.*, 917 F.2d 834 (4th Cir. 1990), a case was removed to the United States District Court for the District of Maryland on the basis of diversity. That court permitted plaintiff to amend its complaint to add a defendant who destroyed diversity and

then remanded the case pursuant to 28 U.S.C. §1447(e). Defendants appealed and petitioned for mandamus.

The Fourth Circuit dismissed the appeal and the petition, finding that §1447(d) prevented review. The court rejected the argument that only §1447(c) orders are immune from review.

> We note that much of the language in *Thermtron* is cast in terms of the grounds given for remand in §1447(c). Section 1447(e) was not added to §1447 by Congress until 1988. We fail to see any reason to treat the grounds for remand authorized by §1447(e) in a different way than the Supreme Court treated the grounds authorized in §1447(c). Our opinion is reinforced by the policy behind the Congressional decision to limit review of remand orders. In the words of the Supreme Court, "[t]here is no doubt that in order to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues . . . Congress immunized from all forms of appellate review any remand order issued on the grounds specified" in the state. *Thermtron*, 423 U.S. at 351, 96 S.Ct. at 593 (citation deleted). It seems to us that the interest in preventing delay is the same whether the remand is based on the grounds authorized in §1447(c) or based on the grounds authorized in §1447(e).

Id., 917 F.2d at 836 n. 5. *CRS/Sirrine* and *Midland Mortgage, supra,* are in direct conflict with the holding below, and with the rule announced by the Fifth Circuit and advanced by Respondents that only subject matter remands are immune from scrutiny. These cases show that it has never been true, either before or after the 1988

amendments, that remands for any reason other than lack of subject matter jurisdiction are reviewable.

More fundamentally, the decisions below remain in irreducible conflict with the *Volvo*, *Gravitt*, and *Briscoe* cases of this Court. That the remands in those cases involved subject mater jurisdiction makes no difference, for *any* authorized remand is unreviewable.[1] Tellingly, Respondents state that "[t]his Court has found erroneous remands such as the one before the Court today subject to review," Brief in Opposition at 5, but nothing is cited.

The Court should summarily reverse on the authority of its clear precedents, or should grant certiorari and delineate clearly any change that has occurred in reviewability of remand orders.

II. THE DECISIONS BELOW CONFLICT WITH *FOSTER*.

Respondents attempt to explain away the patent conflict with *Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207 (3d Cir.), *cert. denied*, 112 S.Ct. 302 (1991), by saying that the cases "simply address different aspects of what is a 'defect in removal procedure. . . .' " Brief in Opposition at 9. The fact remains, however, that in the Fifth Circuit, anything other than the court's subject matter jurisdiction

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[1] *Briscoe* did not even involve a remand below; the court of appeals in that case had analogized to *Thermtron* in holding a certain jurisdictional determination reviewable. This Court rejected the analogy and reaffirmed the rule that if remand is ordered on *any* recognized ground, review is unavailable. *Briscoe v. Bell*, 432 U.S. 404, 423 n. 13 (1977).

is part of removal procedure, whereas in the Third Circuit, numerous other grounds may yield remand after thirty days. These grounds cannot negate federal jurisdiction in some circuits but not others, and this Court should resolve the obvious conflict.

CONCLUSION

Petitioners request the Court to reverse simply on the basis of the settled rule against review of remand orders. Alternatively, Petitioners request the Court to grant certiorari to examine whether reviewability has changed and to resolve the conflict between the Circuits as to the meaning of removal procedure.

Respectfully submitted,

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